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COMMON AND UNCOMMON FAMILIES AND THE AMERICAN CONSTITUTIONAL ORDER

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BOOK REVIEW

Common and Uncommon Families and the American Constitutional Order

*Linda C. McClain**

STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN
CONSTITUTIONAL ORDER

Mark E. Brandon. Lawrence: University of Kansas Press, 2014.

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I. INTRODUCTION: A FAMILIAR STORY ABOUT FAMILIES AND THE AMERICAN CONSTITUTIONAL ORDER

In his aptly named book, *States of Union: Family and Change in the American Constitutional Order*, Professor Mark E. Brandon tackles a familiar “story” about family values and the American constitutional order. The story goes like this: “[A]cross the ages, a particular familial form has held—monogamous, heterosexual,

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permanent, and reproductive. This family is natural and has helped establish and maintain a kind of civilization, including our own.”¹ In this story, “[l]aw, economy, and culture therefore have historically recognized [this family’s] fundamentality,” but “beginning in the 1960s, law altered the landscape on which this family had traditionally flourished.”² Brandon offers as illustrative of this story Mary Ann Glendon’s assertion that, beginning in the 1960s, “‘legal norms which had remained relatively undisturbed for centuries were discarded or radically altered in the areas of marriage, divorce, family support obligations, inheritance, the relation of parent and child, and the status of children born outside marriage.’”³ Critics of this transformation view the Supreme Court as “one culprit,” since it constitutionalized family and marriage, for example, through its evolving doctrine of constitutional privacy.⁴ This “jurisprudence of the family,” critics contend, “weakened the institution of the family by challenging the preconditions for sustaining its traditional forms and functions.”⁵ Such alteration in the constitutional landscape, on this account, threatens to “unravel the social fabric of the constitutional order.”⁶

To students of constitutional law and family law, as well as to observers of contemporary political debates and social movements, this “story” will sound familiar. As I observed, in examining the place of families in the political and constitutional order: “The ideas that a significant link exists between the state of families and the state of the nation, and that strong, healthy families undergird a strong nation, are animating a number of social movements as well as governmental efforts to strengthen families.”⁷ So, too, those who advance rationales for “defending” and “protecting” marriage against a new definition that would extend to same-sex couples have appealed to the idea that the American constitutional and political order have rested upon a particular, unchanging form of family. Illustrative is the testimony that former Massachusetts Governor Mitt Romney gave during a congressional hearing on “preserving marriage” through a federal marriage amendment, held in 2004 just after same-sex couples

1. MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* 2 (2013).

2. *Id.*

3. *Id.* (quoting MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 1 (1989)).

4. *Id.*

5. *Id.*

6. *Id.*

7. LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 1 (2006).

began marrying in Massachusetts. Governor Romney referred to the family unit as underpinning “all successful societies” and as “the single most powerful force that preserves society across generations, through centuries.”⁸ He then asked: “Should we abandon marriage as we know it, and as it’s been known to the framers of our constitution? Has America been wrong about marriage for 200-plus years?”⁹

II. BRANDON’S CONSTITUTIONAL STORY

States of Union is a wry and engaging answer to these rhetorical claims about an unchanging form of family and marriage as well as the relationship between that form and our constitutional order. Brandon “tests some of the claims of proponents of family values” about the relationship between the family and the political and constitutional order, or—to conjure his title—between the state of the family and the state of the union.¹⁰ His title’s reference to “states of union” previews his skepticism about the appeal to one, unchanging family form. Indeed, he explains that his book will “offer discrete glimpses into American familial households across time,” an historical examination that reveals that the “history of family in the United States—and how it came to be in the Constitution—has been a story of change and contestation,”¹¹ rather than of a natural family undisturbed since the founding until the social and constitutional change beginning in the 1960s. These “glimpses” are rich and illuminating. Brandon makes a valuable contribution to our understanding of the place of families in the constitutional order. Moreover, by focusing on distinct types of “American familial households” over time, the book valuably highlights the interplay of family pluralism, legal regulation, and constitutional development.

In his focus on the “American constitutional order” and on the relatively late date at which the U.S. Supreme Court “read a form of family into the Constitution,”¹² Brandon’s book valuably complements the story told in Nancy Cott’s excellent and informative book, *Public Vows: A History of Marriage and the Nation*.¹³ Cott’s thesis was:

8. *Preserving Marriage: A View from the States: Hearing before the S. Comm. On the Judiciary*, 108th Cong. 7 (2004) (statement of Mass. Gov. Mitt Romney) [hereinafter *Romney Statement*].

9. *Id.*

10. BRANDON, *supra* note 1, at 7.

11. *Id.* at 7, 266.

12. *Id.* at 211 (emphasis added).

13. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000). I organized and contributed to a book review symposium for Professor Cott’s book in the journal, *THE GOOD SOCIETY*. Linda C. McClain, *The Place of Marriage in Democracy’s Formative Project*, 11:3 *THE GOOD SOC’Y* 50 (2002).

“From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy, sprouting repeatedly as the nation took over the continent and established terms for the inclusions and exclusion of new citizens.”¹⁴ Her book tells the story of how “[p]olitical and legal authorities endorsed and aimed to perpetuate nationally a *particular* marriage model: lifelong, faithful monogamy, formed by the mutual consent of a man and a woman, bearing the impress of the Christian religion and the English common law in its expectations for the husband to be the family head and economic provider, his wife the dependent partner.”¹⁵ The founders viewed this form of marriage, Cott explained, as “especially congruent with American political ideals,” including consent as the “hallmark” of representative government.¹⁶ Cott’s book explicated the tensions between the role of monogamous marriage as a powerful political metaphor and the “gender order” that marriage helped to shape, which included the common law model of the husband as the legal representative and “head” of the household and the wife as losing her “civic presence” as she was “absorbed into her husband’s legal and economic persona upon marrying.”¹⁷

States of Union, in contrast, emphasizes the relatively late entrenchment of the monogamous nuclear family in the constitutional order. Brandon reveals the complexity of the connections “between law and family,” and how these have been “simultaneously sympathetic and antagonistic,” depending not only on “timing” but also on “the form of family that’s at issue.”¹⁸ Cott’s “archaeology of American monogamy” begins with the founders’ “political theory of marriage” and then elaborates on how, under this political theory, the new nation depended on monogamy¹⁹ and, at various points, “[t]raditional monogamy appeared to need bolstering.”²⁰ The most notable example of such bolstering is the late nineteenth-century federal campaign against the Mormons, memorably upheld by the U.S. Supreme Court in *Reynolds v. United States* (as I discuss below).²¹ Brandon similarly

14. COTT, *supra* note 13, at 2.

15. *Id.* at 3.

16. *Id.*

17. *Id.* at 3, 7.

18. *Id.* at 7.

19. *Id.* at 9 (noting, in a chapter entitled, “An Archaeology of American Monogamy,” that “the Founders had a political theory of marriage” as Christian monogamy).

20. *Id.* at 105.

21. *Id.* at 105; *see also* *Reynolds v. United States*, 98 U.S. 145 (1878).

begins with the “English ancestry” of “the American law of family.”²² He, by contrast, emphasizes a perhaps surprising degree of pluralism in forms of American households and, in his account, *Reynolds* and similar cases indicate the relatively late entrenchment of Christian monogamous marriage in the constitutional order. His book aims to show reasons for skepticism of the claim that an unchanging family form, and attendant family values, undergird the constitutional order. His story, then, is of the coexistence of different forms of households in America even before the founding, the different types of virtues and values generated in those households, and finally, the different regulatory approaches taken toward those families.

Brandon also reminds contemporary readers that, for the founders and the framers, “family” did not always have positive and glowing connotations either as the seedbed of civic virtue or the indispensable foundation for good morals. To the contrary, they viewed certain types of families as problematic and sought to avoid them: they rejected Britain’s institution of the hereditary monarchy, and they also abolished certain feudal doctrines that permitted family dynasties and the concentration of wealth and power within families by restricting the alienation of land.²³ Thus, Brandon explains: “When the Constitution appeared on the scene, neither it nor its proponents said much about family, other than to worry about potential problems of familial self-dealing within government and the need to inhibit the rise of familial dynasties.”²⁴

While the Constitution did not say much about the family, Brandon does grant that “assumptions about the forms and functions of families were in the background.”²⁵ He asserts that “no single type of family provided an exclusive form for nor fit with the polity,” explaining that distinct family types connoted distinct virtues and values:

In fact, there were three prominent types for which one might have found support. One, the Jeffersonian model, was an agrarian family of independent farmers residing on land that was owned fee simple, free from bondage to lords, and congenial to the organic localist production of democratic virtue. The second, Hamiltonian, model was linked to commercial capitalist modes of production and to nationalist, liberal, and individualist virtues. The third was the slaveholding family, apology for which could be traced to the Bible, to sociology, and to a form of Aristotelian natural law. It was not strictly nuclear in form, nor consistently monogamous in practice.²⁶

22. BRANDON, *supra* note 1, at 32 (entitling chapter 2, “English Ancestry of the American Law of Family”).

23. *Id.* at 69–79.

24. *Id.* at 263.

25. *Id.*

26. *Id.* at 263–64.

Brandon then offers what may be the most provocative claim in his book: the slaveholding family “came closest to enjoying explicit constitutional sanction,”²⁷ or, as he puts it elsewhere in the book, “the Constitution acknowledged and even entrenched one particular form of family: the slaveholding household.”²⁸ Pointing out that “slavery didn’t square neatly with republican values,” he stresses that it was nonetheless “legally protected and, for decades after the constitutional founding, slaveholding households were present in every region in the country.”²⁹ Eventually, the “intense political debate” over slavery would play a role in the “breakdown of the constitutional order,” and the failed attempt at a “second secession[]” by southern states.³⁰ Brandon’s book illuminates how part of the conflict over slavery included conflict over what place, if any, slaveholding households would have on the frontier, where there was a fourth family type, “the frontier family.” This category might more accurately be called frontier “families,” since there were “several versions of the family on the frontier, linked to distinct modes of production, from farming, to ranching, to mining, to bourgeois trades and occupations that grew in or around settlements that dotted the West.”³¹ These families, he argues, “tended to strongly exhibit the colonial characteristics of negotiated roles, equality (especially of gender), and exit.”³² Indeed, by necessity, frontier families manifested those characteristics even more strongly than their eastern counterparts. Brandon explains that, while American law “retained elements of English law,” including its “disabling [for wives] doctrine of coverture,” for families on the frontier, harsh conditions challenged the “eastern template for family roles” and “impelled departures from convention,” with husbands and wives taking on, respectively, feminine and masculine tasks and shifting expectations within marriage.³³ Brandon explains that “[f]or many years after the constitutional founding, the nation did not decisively take sides in the competition between slaveholding families and white nuclear families on the frontier.”³⁴

27. *Id.* at 264.

28. *Id.* at 9.

29. *Id.*

30. *Id.* at 81.

31. *Id.* at 264.

32. *Id.* Brandon here draws on the Carl Degler’s argument about the three characteristics of the “modern American family” that “emerged first in the years between the American Revolution and about 1830.” *Id.* at 114 (citing CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM REVOLUTION TO THE PRESENT* 8–15 (1980)).

33. *Id.* at 114, 126.

34. *Id.* at 11.

Brandon's claim about slaveholding families is perhaps his most provocative because such a claim poses an uncomfortable challenge to arguments that at the "time of the founding of the Constitution, it was widely believed that a certain form of organization of family (the marriage-based family) was essential to cultivate civic virtue," which is "an indispensable prerequisite for any republican . . . government."³⁵ That family, on this view, "was the substructure upon which the superstructure of the Constitution was erected."³⁶ Proponents of such a view, for example, tend to omit slaveholding families from their analysis and contend that the "racial family" supported by political leaders and policed by anti-miscegenation laws in post-Civil War America³⁷ was a corruption or "capture" of marriage to promote racist ideologies.³⁸ By contrast, Brandon points out that even an "antislavery politician" like Abraham Lincoln held "racialist views of home and family," and argued that the territories on the frontier should be reserved for "free white laborers, who want the land to bring up their families upon," thus avoiding racial mixing.³⁹

III. UNCOMMON FAMILIES

States of Union also offers glimpses of some "uncommon families," unconventional households that deviated from the nuclear model of family, and examines the distinct ways that "legal and political institutions tended to deal with each form."⁴⁰ Brandon calls these families "uncommon" not because they were rare, but because they "departed from the legal template that the common law (broadly conceived) presumed to impose."⁴¹ Indeed, Brandon finds it noteworthy "that these experiments were as frequent as they were."⁴² He also draws attention to how the experiments played out in different regions of the United States: the "seedbed for experimentation was New England, [and] the expanding western frontier became a place for transplantation," while "southern soil

35. Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 350 (2003).

36. *Id.*

37. BRANDON, *supra* note 1, at 80, 101.

38. See Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOWARD L. J. 117 (2008).

39. BRANDON, *supra* note 1, at 101. Brandon acknowledges that Lincoln's "position on race was not static," and that "he would gravitate to more liberal views before his assassination." *Id.*

40. *Id.* at 264.

41. *Id.* at 151.

42. *Id.*

tended to be inhospitable to these experiments.”⁴³ The institutional response to these “uncommon families” entailed “the gradual nationalization and constitutionalization of the morality of family,”⁴⁴ culminating (as I discuss below) in the Supreme Court’s various anti-polygamy decisions.

This review cannot do justice to the rich sketches Brandon offers of a sampling of these “uncommon families.” Some elaboration will afford the reader a sense of how these groups perceived family and marriage and how the society around these groups perceived them, sometimes precipitating legal and political responses. By focusing primarily on groups whose communal families found their roots in religious inspiration or teaching, Brandon makes the instructive point that, “far from being a source of social stability, religion was the engine for radical experimentation in the forms, functions, and values of family.”⁴⁵ Indeed, to pick up on the “seedbed” imagery Brandon introduces, these uncommon families inspired by religion seem to unsettle the conventional expectation—often traced back to the founding—that both religion and the family would be seedbeds of virtue undergirding America’s “experiment in ordered liberty.”⁴⁶ Through freedom of conscience and belief, then, “[l]aw provided a space in which a group’s associations and productive enterprises might flourish.”⁴⁷ By the same token, perceived affronts to sexual morality were a limiting condition on the degree of tolerance for such experiments.

Brandon begins with communal families prior to nationhood, which were “ascetic, pietist, millenarian, and Protestant.”⁴⁸ While some of these groups permitted marriage, they extolled celibacy as they “prepar[ed] for Christ’s second coming and for their own spiritual rebirth in the kingdom of heaven,” finding doctrinal support in the writings of the Apostle Paul.⁴⁹ Some forms of communal life, such as a pietist group initially called “the Solitary” and renamed (as it grew) “The Community at Ephrata,” included segregating men and women,

43. *Id.*

44. *Id.*

45. *Id.* at 180.

46. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF AMERICAN POLITICAL DISCOURSE* 116 (1991) (“there is much evidence that [the Founders] counted on families, custom, religion, and convention to preserve and promote the virtues required by our experiment in ordered liberty”); McClain, *supra* note 7, at 52 (explaining the “civil society proposition” advanced by Glendon and others that the founders assumed that institutions of civil society—including the family and religion—would be seedbeds of civic virtue).

47. BRANDON, *supra* note 1, at 180.

48. *Id.* at 152.

49. *Id.*

who both lived in celibacy (thus “suppressing *eros*”).⁵⁰ Interestingly, married people joined this group, which repudiated marriage and attributed “the marriage state” to “the fall of man.”⁵¹ The group’s communism (the sharing of property) did not trigger reaction by public authorities, but instead conflict arose when the group resisted paying a “single men’s tax,” contending that they were a “spiritual family” and should not be put in the same class as “rogues and vagabonds.”⁵² They were willing, however, to “pay of their earthly possessions what was just.”⁵³ The judge accepted the bargain, thus, Brandon quips, “making Ephrata the first officially recognized same-sex family in North America.”⁵⁴

This group also came into conflict with civil authorities in 1744 when the leaders, the Eckerlin brothers, constructed a building where civilly married husbands and wives could give each other “letters of divorce” in order to pursue “spiritual celibate lives” by entering, respectively, the Brotherhood of Zion and the Roses of Saron.⁵⁵ Following a civil investigation into these “extra-legal divorces,” Beissel, the founder, “recanted and ordered the couples to return to their previously married lives.”⁵⁶ Brandon observes: “Even on the fringe of European settlement, the civil authority was jealous of its control of marriage and divorce.”⁵⁷ Otherwise, the Brotherhood engaged in many economic pursuits, with a “diverse portfolio of industrial ventures” that brought “an impressive level of material prosperity.”⁵⁸

This emphasis on material prosperity is also relevant to Brandon’s recounting of the Shakers, a communal group led by a woman, Ann Lee. The group was “forming in the wilderness of upstate New York” just as Ephrata was dissolving.⁵⁹ Lee migrated from England to New York in 1774, just before the Revolution. Renouncing “lustful gratifications of the flesh” and “distancing herself from her marriage both psychically and physically,” Lee, or “Mother Ann,”

50. *Id.* at 155.

51. *Id.*

52. *Id.* at 156.

53. *Id.*

54. *Id.* Brandon links the “single men’s tax” to Queen Elizabeth’s attempt, discussed in Chapter 2 of his book, in sixteenth century England, “to identify and control ‘masterless men.’” *Id.*; see *id.* at 51 (explaining that, in 1579, “Queen Elizabeth issued a proclamation against ‘Rogues and Vagabonds, and all Idle [and Vagrant] persons and Masterlesse men, having not wherewith to live . . . by any lawful Labour or Occupation’”).

55. *Id.* at 156.

56. *Id.*

57. *Id.*

58. *Id.* at 156–57.

59. *Id.* at 157.

preached that the Shakers “had already risen with Christ, but the cost of resurrection was to ‘forsake the marriage of the flesh.’”⁶⁰ The group survived the death of its charismatic leader in 1784. Its theology embraced the equality of men and women in their “rational faculties and governing power” as a basic biblical tenet and viewed God as a duality, including “the likeness of male and female” rather than a Trinity.⁶¹ The Shaker community, moreover, would be a new spiritual family, a “marriageless family,” for Shakers insisted that “disorganizing [nuclear] families, and dissolving the ties of nature” were necessary to attain the “gospel relation” required of Christ’s kingdom on earth.⁶² Brandon points out that the Shakers on the one hand recognized monogamous marriage as a “civil right and a civil institution,” but on the other as “not an institution with a connection to Christianity, properly understood.”⁶³ Thus, Mary Dyer, who originally joined with her husband and their five children but subsequently left, wrote and spoke against the Shakers as destroying the family.⁶⁴ Brandon notes that she unsuccessfully petitioned the New Hampshire legislature for a custody order for her children, but later obtained a divorce when the legislature passed a law providing as a ground for divorce that a “spouse [had] joined and stayed for at least three years with a sect that professed that ‘the relation between husband and wife [is] unlawful.’”⁶⁵ In granting the divorce, the court observed that Mary’s husband, Joseph, by failing to cohabit with her, “had failed in a duty that was ‘the great end of matrimony, the continuation of the species.’”⁶⁶

Notwithstanding the Shakers’ unconventional views about marriage and their uncommon family form, Brandon reports that, by the mid-nineteenth century, “most Americans . . . extended to the Shakers a sincere if sometimes grudging respect for the way of life they produced.”⁶⁷ In words evocative of Chief Justice Burger’s opinion in *Wisconsin v. Yoder* (speaking of the Amish community), Brandon continues: “If they were odd, they were productive, honest, and essentially harmless.”⁶⁸ Some observers, such as Friedrich Engels, went beyond grudging respect to outright praise for a group that seemed capable of forming a well-ordered society without marriage,

60. *Id.* at 159.

61. *Id.* at 160.

62. *Id.* at 161.

63. *Id.*

64. *Id.* at 164–65.

65. *Id.* at 165.

66. *Id.*

67. *Id.* at 167.

68. *Id.*; *cf.* *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

“bourgeois” property, and without “the laws of the land.”⁶⁹ Courts also, Brandon observes, showed a “surprising level of tolerance” toward the Shakers; to illustrate, he notes the willingness of the Michigan Supreme Court to define “family,” for purposes of an insurance policy, as including “any group constituting a distinct or social body,” and even “whole sects, as in the case of the Shakers.”⁷⁰

As a contrasting example of a communal family that “repudiated marriage and committed itself to sustained economic self-sufficiency,” Brandon discusses the Oneida community, which “publicly parted company with the Shakers on the matter of sex.”⁷¹ Instead of repudiating sexuality and “the flesh,” the Oneida community founder, John Humphrey Noyes, articulated a vision of channelling sexuality that included “complex marriage” (or non-monogamy), male continence (refraining from ejaculating during or after sex unless pregnancy was intended), and also the social control of reproduction by “stirpiculture” (or “the cultivation of the race”).⁷² Like the Shakers, the Oneida community espoused the equality of men and women. These unconventional sexual beliefs and practices brought the Oneida into conflict with civil authorities and religious leaders at various points, Brandon chronicles, particularly with New York Congressman Anthony Comstock. Comstock was responsible for the Comstock Law, which criminalized the mailing of “‘obscene, lewd, and/or lascivious material,’ including information about contraception or abortion.”⁷³ Not only did that law bar a sizable segment of the Society’s tracts, but “[p]ro-Comstock forces . . . adopted resolutions condemning the community as a ‘pernicious institution which rests substantially on a system of organized fanaticism and lust,’ ” and a major convention of churches urged an investigation of the community.⁷⁴ Up until this point, the Oneida community had enjoyed “stunning prosperity” in its original and five additional locations and had weathered various storms brought on by investigations into their rumored sexual practices. Noyes proposed abandoning complex marriage and holding onto economic communism to address the group’s unpopularity; although his proposal was ratified, the community itself dissolved just a few years later, leaving only a holding company.⁷⁵

69. BRANDON, *supra* note 1, at 166.

70. *Id.* at 167.

71. *Id.* at 168.

72. *Id.* at 170–75.

73. *Id.* at 177.

74. *Id.*

75. *Id.* at 177–78.

Brandon sums up his analysis of these uncommon families by noting that Aristotle recognized two “natural” and constitutive functions of the household: production and reproduction.⁷⁶ Although these communities “might be intensely committed to a religious idea,” what allowed them to flourish in the long term was “a practical commitment to material sustenance and well-being.”⁷⁷ Remarkably, the Shakers “sustained their communities for generations,” as new members joined, even though they foreswore “the sexual means through which reproduction takes place.”⁷⁸ The Oneidas, also a highly productive community, “were badgered into abandoning their familial experiment” because of the concern of their opponents over, as Brandon puts it, “who was having sex with whom, and to what end.”⁷⁹

IV. THE BATTLE AGAINST MORMONISM AND THE CONSTITUTIONAL ENTRENCHMENT OF THE MONOGAMOUS FAMILY

States of Union then turns to the Mormons, “uncommon families” with a particularly significant place in “the story of the relation between families and the American constitutional order.”⁸⁰ As he notes, the story of the rise of Mormonism in the United States, the westward migration of the Mormons, and the federal government’s campaign against polygamy and the theocracy of the Utah territory has been told many times.⁸¹ So too has the denouement of the Church of Latter Day Saints’ revelation that it should discontinue the practice of plural marriage and Utah’s admission to the Union, with a provision in Utah’s constitution guaranteeing “perfect toleration of religious sentiment,” while forever banning the practice of “polygamous and plural marriages.”⁸² Constitutional law and family law casebooks excerpt *Reynolds v. United States*,⁸³ perhaps the best known of the U.S. Supreme Court’s many decisions involving the Mormons. Brandon’s central point in this part of his book is that “[t]he resolution of the Mormon Question completed a process through which the monogamous family was both nationalized and

76. *Id.* at 178.

77. *Id.*

78. *Id.*

79. *Id.* at 179.

80. *Id.* at 181.

81. *Id.*

82. For an often-cited account, see SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* (2002). For Brandon’s account, see BRANDON, *supra* note 1, at 180–210. For Cott’s, see COTT, *supra* note 13, at 105–31.

83. 98 U.S. 145 (1878).

constitutionalized.”⁸⁴ That process, which he describes in an earlier chapter, “had begun much earlier in the nineteenth century” against native tribes, whose family forms did not conform to “the common-law template.”⁸⁵ Brandon points out that, in both cases, Congress perceived a threat to the political order from a way of life incompatible with Christian civilization. Political rhetoric spoke of the incompatibility of “savage and civilized life,”⁸⁶ and of the need to “kill the Indian” in Indians so they could assimilate.⁸⁷ Federal efforts (always disturbing to read) included compelling Indian children to assimilate through attending off-the-reservation schools, shoring up the “manhood” and the work ethic of Indian men by dividing reservation land into lots, and suppressing polygamy.⁸⁸

With respect to the Mormon practice of polygamy, the trope was that polygamy was tantamount to barbarism and incompatible with Christian civilization. Thus, the *Reynolds* Court claimed that polygamy “has always been odious among the northern and western nations of Europe” and, prior to the Mormons, was “almost exclusively a feature of the life of Asiatic and of African people.”⁸⁹ The Court famously linked polygamy to “stationary despotism” and monogamy to republicanism. Brandon points out the “several items of irony and interest” in *Reynolds*:

One involved the Court’s invocation of the sacred to limit religiously motivated action. Another was the Court’s oddly incomplete account of political history, which ignored not only monogamous despotisms but also the long history of concubinage among the royalty and aristocracy even of northern and western Europe. Still another was the Court’s hand wringing over patriarchy, essentially declaring it be an un-American, despite the fact that the United States practiced its own republican version of patriarchy. In fact, Mormon Utah was one of the few places in the United States where women could vote. To be sure, there were limits to women’s freedom in exercising that right [to vote], supervised as they were by husbands and church fathers. But they did possess the formal right—for a time, at least.⁹⁰

The Supreme Court, Brandon details, upheld other federal enactments directed at polygamy, such as the Edmunds Act, which disenfranchised bigamists, polygamists, and cohabitators, and barred

84. BRANDON, *supra* note 1, at 210.

85. *Id.*

86. *Id.* at 143 (quoting Hiram Price, Commissioner of Indian Affairs, on the incompatibility of “savage and civilized life”);

87. *Id.* at 146 (quoting Captain Richard Henry Pratt, who established the Carlisle School for Indian children: “We accept the watch-word. There is no good Indian but a dead Indian. Let us by education and patient effort kill the Indian in him, and save the man!”).

88. *Id.* at 142–50.

89. *Id.* at 205 (quoting *Reynolds v. United States*, 98 U.S. 145, 165 (1878)).

90. *Id.* at 206.

them from jury service and from holding any appointed or elected office in the territory. Once again, the Court stressed the vital relationship between the form of the family and the “founding of a free, self-governing commonwealth,” praising the family “springing from the union for life of one man and one woman in the holy estate of matrimony,” as “the sure foundation of all that is stable and noble in our civilization.”⁹¹ Brandon details a litany of further Congressional acts directed against the territory of Utah and against polygamy. In *Davis v. Beason*, the Court rejected a claim that polygamy was protected by the free exercise of religion and countered that “[b]igamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marital relation, to disturb the peace of families, to degrade woman, and to debase man.”⁹² Brandon points out that, writing in 1890, the Court probably had the Oneida community in mind when it warned of the consequences of allowing the free exercise of religion to include religiously motivated conduct: “[T]here have been sects which denied as part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members.”⁹³ Brandon points out, again, the irony of the Court rejecting a free exercise claim by taking a position that resembled an establishment; that is, that “the general consent of the Christian world” is that the punitive power of government may be used against “crimes” that “the tenets of a religious sect” encourage.⁹⁴ Just a few months later, Brandon notes, the Court upheld the authority of Congress to “repeal the charter of the Mormon Church and seize the church’s property” and, in so doing, referred to the church’s “nefarious doctrine” of polygamy and polygamy’s spread as “a return to barbarism . . . contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western

91. *Id.* (quoting *Murphy v. Ramsey*, 114 U.S. 15 (1885)).

92. 133 U.S. 333, 341; *see also* BRANDON, *supra* note 1, at 208.

93. BRANDON, *supra* note 1, at 208–09.

94. *Id.* Subsequent to the publication of *States of Union*, a federal district court in Utah struck down the “cohabitation” prong of Utah’s bigamy statute and raised questions about the continuing vitality of *Reynolds v. United States*, as directed to that part of the statute. *Kody Brown et al. v. Buhman*, No. 2:11-cv-0652-CW, slip op. at 11–12 and n. 11 (D. Utah, Dec. 13, 2013). The court concluded that *Reynolds* reflects the “entrenched nature of an orientalist mindset among ruling elites,” in its “explicit ‘distinction between Western superiority and Oriental inferiority,’ particularly with respect to religious practices. *Id.* The court observed that “the Supreme Court has over decades [since *Reynolds*] assumed a general posture that is less inclined to allow majoritarian coercion of unpopular or disliked minority groups, especially when blatant racism (as expressed through Orientalism/imperialism, religious prejudice, or some other constitutionally suspect motivation, can be discovered behind such legislation.” *Id.* at 11.

world.”⁹⁵ Several months later, the president of the church announced a revelation that the Church should discontinue practicing polygamy. Eventually, Congress released the Church’s assets, “justifying the release on the ground that the church had ceased practicing and advocating polygamy,”⁹⁶ and President Cleveland signed the Enabling Act allowing the People of Utah to ratify a constitution and join the U.S. as a state, on equal footing with the original states.⁹⁷

The polygamy cases, Brandon argues, exemplify one prominent theme in the Court’s “familial jurisprudence”: “[T]he importance of family in promoting and preserving a kind of moral order.”⁹⁸ To reiterate his book’s claim, they are also significant as marking the time “when the Supreme Court bestowed its blessing on the national policy” of committing publicly to “the monogamous nuclear family” in the name of “preserving civilization and progress.”⁹⁹ Brandon insightfully adds that, although the Court insisted that “the nuclear family promoted two abstract values central to the American order: liberty and equality,” that commitment, arguably, was “more rhetorical than real,” given the persistence of “restrictive family policies” and lingering of “gender hierarchy” well into the twentieth century.¹⁰⁰

V. MODERN DEBATES ABOUT THE CONSTITUTION AND FAMILIES

When it turns to “modern times,” *States of Union* adeptly identifies certain tensions within the Court’s jurisprudence about the continuing relevance of family to present debates.¹⁰¹ One benefit of Brandon’s book is that his focus on the family in the constitutional order brings into relief certain features of that jurisprudence that are not as evident when encountering it, casebook style, in particular contexts.

Perhaps the most striking tension concerns the Court’s approach to governmental regulation of the family, which relates in turn to tension over whether to trust families as vital sources of social—and literal—reproduction or distrust them as units that may undermine the political and constitutional order. As the polygamy cases vividly illustrate, the Court has upheld federal governmental

95. BRANDON, *supra* note 1, at 209 (quoting *Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890)).

96. *Id.*

97. *Id.* at 210.

98. *Id.* at 211.

99. *Id.* at 265.

100. *Id.*

101. *Id.* at 211.

efforts to prohibit family forms deemed inimical to good political order and republican values (and, as well, to Christianity). As his discussion of federal measures against the native tribes suggests, the federal government perceived that forcing assimilation of Indians into nuclear family forms and instilling proper “values” in their children was necessary for Indians to continue to exist amidst a Christian civilization. The founders and framers sought to prevent certain types of families they viewed as incompatible with American liberty, that is, feudal and dynastic families and hereditary, monarchical families. Slaveholding households, Brandon points out, came closest to enjoying constitutional sanction and yet, over time, the political and constitutional conflict over slavery led to civil war. Opponents of slavery compared it to barbarism, as bad as or worse than polygamy.

Brandon also puts in context the Court’s upholding of compulsory sterilization in *Buck v. Bell*, which illustrates a willingness to regulate and even restrict family formation on a view that certain families will harm or weaken society. Shocking enough as Justice Holmes’s language in *Buck v. Bell* (1927) still is, it is even more shocking to read it separated by just a few pages in Brandon’s book (and by a few Supreme Court terms) from the Court’s famous anti-totalitarian rhetoric in defense of liberty (in parental and other forms) in *Meyer v. Nebraska*, decided in 1923, and in *Pierce v. Society of Sisters*, following in 1925.¹⁰² *Meyer* and *Pierce* feature in contemporary jurisprudence and constitutional argument in support of noninterference with the “private realm of the family” (articulated in *Prince v. Massachusetts*¹⁰³ in 1944) and in favor of allowing families to carry out their important tasks of social reproduction. As Brandon details, *Skinner*, decided in 1942, articulated the basic right “to have offspring,” linking it to the right to marry and warning of the “far-reaching and devastating effects” of exercising “the power to sterilize.”¹⁰⁴

The tension between the Court’s recognition both that there is a “private realm” of family life and that the family is not immune from regulation continues to the present day. James Fleming and I have described this as a “two-step” in the Court’s jurisprudence about the regulation of the family, marriage, and parents: “[F]ollowing quick on the heels of step one—a declaration that something is ‘fundamental’

102. *Id.* at 216–17 (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

103. 321 U.S. 158 (1944).

104. BRANDON, *supra* note 1, at 222.

and ‘private’—is step two—a clarification that it is neither absolute nor beyond regulation.”¹⁰⁵

Brandon illustrates how the emerging jurisprudence of individual privacy limited states’ ability to enforce particular family or moral values through law. Complicating the story is the emergence of sex equality in the Court’s Equal Protection jurisprudence, so that the status quo in gender relations within the family upheld by the Court in *Bradwell v. Illinois* (1873)¹⁰⁶ and well into the twentieth century became unconstitutional as the Court took a closer look at sex-based classifications.¹⁰⁷ If nothing else, claims about an unchanging and universally understood meaning of family or marriage stumble in confronting the contrast between the Court’s upholding of sex-differentiated roles for husband and wife into the 1960s and the Court’s repudiation of archaic stereotypes about a woman’s place in the home in subsequent decades. The Court’s evolving Equal Protection jurisprudence, from upholding anti-miscegenation laws to striking them down as embodying white supremacy, also undercuts appeals to a timeless form of family recognizable to the founders and yet threatened by more modern conceptions. In other words, the intertwined evolution of the law of marriage and of Equal Protection jurisprudence about gender and the status of women offers a powerful rejoinder to questions like that posed by former Governor Romney at the beginning of this essay: “Should we abandon marriage as we know it, and as it’s been known to the framers of our constitution? Has America been wrong about marriage for 200-plus years?”¹⁰⁸

VI. CONCLUSION

Appropriately, *States of Union* concludes with an epilogue on *United States v. Windsor*, in which the Court struck down Section 3 of the Defense of Marriage Act (“DOMA”).¹⁰⁹ DOMA itself illustrates that strand of thought that Congress must act to preserve traditional (Judeo-Christian) marriage from threatening forms of family—in this case, marriage by two men or two women. In his dissent, Justice Alito contended that Edith Windsor sought to have the Court “resolve a debate between two competing views of marriage,” the “traditional” or “conjugal” view and the “consent-based” vision of marriage.¹¹⁰

105. JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 249 (2013).

106. 83 U.S. 130 (1873).

107. BRANDON, *supra* note 1, at 228–29.

108. *Romney Statement*, *supra* note 8, at 7.

109. *Id.* at 268–73 (discussing *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

110. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

Brandon argues that Justice Alito's dissent relies upon the erroneous view of marriage as fixed and—until recently—unchanged. Although Justice Alito stated that the Constitution “does not codify either of these views of marriage,” he also “asserted that an original understanding of the Constitution would likely support the traditional view,”¹¹¹ which is of marriage “as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.”¹¹² Brandon points out several problems with Alito's position in *Windsor*, among them, “his reduction of views of marriage into two general types,” when, “[i]n fact, there is, and has long been in the United States, a wide range of views of the point and purpose of marriage, perhaps as many views as there have been marriages.”¹¹³ In addition, while Alito characterizes the consent-based view of marriage, “a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction,” as “very prominent” in “popular understanding” and “popular culture,”¹¹⁴ Brandon points out that certain Supreme Court precedents (such as *Turner v. Safley*¹¹⁵) “positively embrace a companionate view of marriage.”¹¹⁶ Another component of Justice Alito's argument is his assertion that “the family is an ancient and universal human institution” and that “family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects.”¹¹⁷ Although Brandon does not discuss this part of the opinion, it too reflects a static view of family that Brandon's book challenges. Consider, for example, the radical difference in the prescribed and hierarchical gender roles of husband and wife in English common law, adopted by the colonies and U.S. courts and affirmed in earlier Supreme Court opinions, and the modern template of marriage as an equal partnership. The joint opinion in *Planned Parenthood v. Casey*¹¹⁸ noted the shift from an earlier view of the Constitution, of women, and of the family, which gave husbands authority over their wives, to the contemporary constitutional understanding of women, the family, and marriage.¹¹⁹

111. BRANDON, *supra* note 1, at 269.

112. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

113. BRANDON, *supra* note 1, at 269.

114. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

115. 482 U.S. 78 (1987).

116. BRANDON, *supra* note 1, at 270.

117. *Windsor*, 133 S. Ct. at 2715.

118. 505 U.S. 833 (1992).

119. *Id.* at 897–898.

Brandon's concluding section on "American Constitutional Families" usefully pulls together the central messages of his book.¹²⁰ He observes: "[T]he history of family in the United States—and of how it came to be in the Constitution—has been a story of change and contestation. . . . There has always been a plurality of views about the point of and reasons for marriage."¹²¹ Monogamy, he acknowledges, comes close to a "constitutional model" of family, an "officially sanctioned institution," but even so, "that has been contested, and its form and function have altered through the years."¹²² Other than that, he counsels, "there is no constitutional ideal of marriage, nor of family," but simply "constitutional parameters within which debates over marriage and family have played out." After all, America "has always been a place for experiments and for diverse ways of life."¹²³

120. BRANDON, *supra* note 1, at 263.

121. *Id.* at 266.

122. *Id.*

123. *Id.*